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In The
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

vs.

CALIFORNIA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ITS THREE CALIFORNIA AFFILIATES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Of particular note here, the ACLU represented the prisoner appellees in *Lee v. Washington*, 390 U.S. 333 (1968), where this Court held that Alabama statutes requiring racial segregation in prisons and jails violated the Fourteenth Amendment. The ACLU is joined on this brief by its three California affiliates: the ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties.

STATEMENT OF THE CASE

California has a policy of segregating prisoners by race for the first sixty days of their incarceration and for the first sixty days after their transfer to a new institution. This case presents the question of whether California's policy violates the Constitution. In 1995, Garrison Johnson, acting without a lawyer, sued the California Department of Corrections, alleging that the State's long-standing practice of segregating prisoners by race for sixty days each time they arrive at a new institution violated his right to equal protection of the laws under the Fourteenth Amendment. Pet. App. 3a-6a. In 1998, the United States District Court for the Central District of California dismissed his complaint, but the Ninth Circuit

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

reversed in part, holding that Johnson had stated a claim of racial discrimination under the Equal Protection Clause. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (*per curiam*).

On remand the district court appointed counsel, and discovery was conducted. Pet. App. 6a. After initially denying defendants' motion to dismiss, the district court reconsidered defendants' motion to dismiss on the grounds of qualified immunity in light of *Saucier v. Katz*, 533 U.S. 194 (2001). Pet. App. 33a. Upon reconsideration, the court restated its holding that there was a triable issue of fact as to whether the State's policy violated the Equal Protection Clause. *Id.* However, citing *Turner v. Safley*, 482 U.S. 78 (1987), the district court noted that the State's policy might not violate the Equal Protection Clause, and it therefore granted qualified immunity to the two defendants who had been sued for damages, finding that the applicable law had not been clearly established. Pet. App. 34a.

On appeal, the Ninth Circuit reached the merits of petitioner's equal protection claim. Pet. App. 7a. However, it rejected petitioner's argument that the State's explicit policy of racial discrimination should be subject to strict judicial scrutiny. Instead, it held that the four-part *Turner* test was controlling and that the relevant issue to be decided was whether the State's uncontested policy of racial segregation "is reasonably related to [its] concern for increased racial violence." Pet. App. 13a. In resolving that question, the court first assumed a "common-sense connection" between the State's legitimate interest in prison safety and its policy of racially segregating prisoners, which in the court's view Johnson was unable to disprove. Pet. App. 22a As a result, the State "was not required to make any evidentiary showing concerning the connection." *Id.* (internal quotation and citation omitted). Next, the court broadly framed the question of whether Johnson had alternative means to exercise his right to be free from governmental racial discrimination by looking

at his entire period of incarceration rather than the multiple sixty-day periods during which the State segregated him, and it found that reasonable alternatives existed. Pet. App. 23a-24a. The court then held that Johnson did not rebut the State's claim that violence would result if the State stopped segregating the reception centers by race. Pet. App. 27a. Finally, the court found that Johnson had failed to meet his burden of showing that there are "obvious, easy alternatives" to racial segregation, which would demonstrate that the State's response was exaggerated. Pet. App. 29a. Thus, while noting that the court would "undoubtedly . . . strike [the policy] down as unconstitutional" if it were implemented anywhere other than a prison, the court held that the policy was constitutional. Pet. App. 31a.

The Ninth Circuit denied Johnson's petition for rehearing and rehearing *en banc*, Pet. App. 37a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

The Ninth Circuit erred when it applied the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987), rather than strict scrutiny, to California's policy of segregating prisoners by race for sixty days every time they arrive at a new institution.

All government classifications based on race are subject to strict scrutiny under this Court's holdings. That is true for the criminal justice system in general, and it is true more specifically for prisons and jails. Nothing in this case justifies an exception to that general rule. A State's allegedly good intentions in classifying its citizens by race do not remove the need for strict judicial scrutiny.

If anything, the need for strict scrutiny is underscored by the context in which this case arises. Minorities are vastly over-represented in prisons and jails. Minority defendants also receive longer sentences and higher bail amounts than

white defendants. These well-known statistics have led to a widespread perception of racial discrimination in the criminal justice system. In the face of that perception, the assurance that any express racial classification will be subject to strict scrutiny is critical to restoring public confidence in the evenhanded administration of justice.

Moreover, the rationale for applying the deferential *Turner* standard does not extend to claims of racial discrimination. *Turner* rests on the understanding that prisoners necessarily lose control over many aspects of their daily lives once incarcerated, and that the exercise of certain rights by prisoners will often conflict with the necessities of confinement. The right of free association, for example, is inevitably restricted in prison. Accordingly, the Court has applied the *Turner* standard when reviewing regulations restricting such rights, and has upheld those regulations if they are reasonably related to a legitimate penological interest.

On the other hand, the Court has not applied *Turner* when the rights at issue do not depend on volitional choices by the prisoner but, rather, exist independent of those choices as constitutionally-imposed limits on government power. For example, the Court has not applied *Turner* when reviewing claims of cruel and unusual punishment under the Eighth Amendment, or the right to be free from arbitrary punishment safeguarded by the Due Process Clause. These are not rights that are "exercised," to use the language of *Turner*. They are rights that are enjoyed by all prisoners, that cannot be waived by any prisoner, and that are not diminished by the fact of incarceration. Racial segregation plainly fits into this latter category, as the Court made clear in *Lee v. Washington*, 390 U.S. 333 (1968).

In *Lee*, this Court was properly skeptical of allowing racial segregation on the mere assertion of possible racial violence. At the same time, it made clear that courts remain

free to consider the exigencies of prison security and discipline in particularized circumstances when reviewing policies that segregate by race. Accordingly, application of the *Turner* standard to racial segregation claims is unnecessary.

Such application would also be inconsistent with the core values of a system dedicated to equal justice under the law; prison policies imposing racial segregation should not carry the presumption of constitutionality required by the *Turner* standard. Moreover, under *Turner*, evidence that segregation actually promotes racial violence and creates an atmosphere of racial fear and mistrust can simply be ignored. By using race as a proxy for gang membership and for a proclivity for violence, the State's policy in this case is both overinclusive and underinclusive; it also perpetuates stigmatizing racial stereotypes.

When reviewed under strict scrutiny, the State's policy fails because it is not narrowly tailored: it is indefinite in duration; it is undifferentiated in its sweeping generalizations regarding race and the propensity for violence; and there is no evidence that the State considered any race-neutral means of achieving its goals. Therefore, the judgment of the Ninth Circuit should be reversed.

ARGUMENT

I. A state policy that regularly segregates prisoners according to race is subject to strict judicial scrutiny

"Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (citation and internal quotations omitted); *see also Miller v. Johnson*, 515 U.S. 900, 904 (1995) (noting that the "central mandate [of the Equal Protection Clause] is racial neutrality in governmental

decisionmaking"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 495 (1954) (holding that segregation of school children solely on the basis of race violates the Equal Protection Clause "even though the physical facilities and other 'tangible' factors may be equal"); *cf. Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . .").

Thus, this Court has held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny.") (internal quotation omitted); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("It is by now well established that all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.") (internal quotation omitted); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (O'Connor, J., plurality opinion) (applying strict scrutiny to racial classifications); *id.* at 520 (Scalia, J., concurring in judgment) ("I agree . . . with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race . . . ."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (stating that "racial classifications of any sort must be subjected to 'strict scrutiny'"); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Such classifications are subject to the most exacting scrutiny[.]"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (stating that at "the very least, the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'") (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

Even when this nation was at war, this Court has applied the "most rigid scrutiny" to racial classifications related to national security. *Korematsu*, 323 U.S. at 216. The Court in that case recognized that the Government believed "a menace to the national defense and safety [existed], which demanded that prompt and adequate measures be taken," but nonetheless applied strict scrutiny in its review of an order excluding all persons of Japanese origin. *Id.* at 218-19 (internal quotation omitted). Similarly, this Court has refused in the face of violence to alter its finding that segregated schools do not survive strict scrutiny, requiring a state to integrate a public high school despite accepting the lower court's findings that the integration had led to repeated violence, had an adverse effect on the education of the students, and had generally led to "chaos, bedlam and turmoil." *Cooper v. Aaron*, 358 U.S. 1, 13, 16 (1958) (quotation omitted) ("The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.").

Nor has this Court hesitated to apply strict scrutiny to racial classifications in sensitive areas of the criminal justice system. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 100 (1986). The Court in *Batson* noted "the prosecutor's historical privilege of peremptory challenge free of judicial control" and the "'long and widely held belief that peremptory challenge is a necessary part of trial by jury'" as a "means of assuring the selection of a qualified and unbiased jury." *Id.* at 91 & n.15 (quoting *Swain v. Alabama*, 380 U.S. 202, 219 (1965)). Nonetheless, the Court flatly held that challenging a juror on account of his or her race violates the Equal Protection Clause. *Id.* at 89.

Furthermore, "the fact of equal application [to members of all races] does not immunize the statute from the

very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving*, 388 U.S. at 9.

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree.

Powers v. Ohio, 499 U.S. 400, 410 (1991).

Not even a State's allegedly "good intentions" in considering race remove the need for strict judicial scrutiny. *See Grutter*, 539 U.S. at 326; *Gratz*, 539 U.S. at 270; *Adarand*, 515 U.S. at 224; *id.* at 240 (Thomas, J., concurring in part and concurring in the judgment) ("That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race."); *Croson*, 488 U.S. at 493.

Lastly, in *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), this Court applied heightened scrutiny to Alabama statutes that required racial segregation in prisons and jails, the very issue in this case. *Id.* at 333-34. The lower court rejected the prison's claims "that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts," and held that "it is unmistakably clear that racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (footnote omitted), *aff'd*, 390 U.S. 333 (1968). This Court affirmed in a *per curiam* opinion. *Lee*, 390 U.S. at 333-34; *see*

also Hudson v. Palmer, 468 U.S. 517, 523 (1984) (quoting *Lee* and stating "that invidious racial discrimination is as intolerable within a prison as outside, except as may be essential to 'prison security and discipline'").

In his concurrence in *Lee*, Justice Black noted that "prison authorities have the right, acting in good faith and *in particularized circumstances*, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee*, 390 U.S. at 334 (Black, J., concurring) (emphasis added). However, the right to take racial tensions "into account" in order to ensure prisoners' safety does not relieve the States from strict judicial scrutiny of classifications on the basis of race. *See Lee*, 390 U.S. at 333; *cf. Gratz*, 539 U.S. at 270 (reviewing admissions policy that considered race in order to ensure educational diversity and stating, "[b]ecause racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, our review of whether such requirements have been met must entail a most searching examination") (internal quotations and citations omitted; alteration incorporated); *Adarand*, 515 U.S. at 228 ("[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible governmental use of race.").

The State's policy here does not survive review under strict scrutiny. Although protecting the safety of prisoners is a compelling state interest, the State's policy is not narrowly tailored to that interest: it is indefinite in duration and undifferentiated in its sweeping generalizations regarding race and the propensity for violence. Every time a male prisoner arrives at a California Department of Corrections facility, either as a new prisoner or as a transfer, he is initially housed for sixty days in a reception center, and while there, his chance of being celled with a prisoner of a different race "is '[p]retty close' to zero percent" because race is the dominant factor in housing at the reception centers. Pet. App. 2a-4a. This policy has been in place for over twenty years,

Pet. App. 21a, and has "no logical stopping point," *Wygant*, 476 U.S. at 275. In fact, there is no movement at all toward a non-racial initial classification system; instead, the current system will simply exist in perpetuity.

Further, there is no evidence that the State in this case considered race-neutral means of protecting the prisoners, *see Adarand*, 515 U.S. at 237-38, or that its practice is the least restrictive means to reach its goal. So far as the record reveals, no other prison system in the country, state or federal, has adopted a similar policy.

Finally, the State's broad use of race in its policy is not the best fit for its goal of reducing violence. The policy uses race as a mere proxy for gang membership, which is in turn a proxy for the potential for violence. The court below described seven specific incidents, all of which involved gang violence and many of which involved *intra*racial violence as opposed to interracial violence. Pet. App. 16a-17a n.9. The use of race as a proxy for gang membership also ignores the potential for violence and pressure against non-gang members by gang members of the same ethnicity.

Because the court below failed to apply strict scrutiny to the State's policy of racially segregating prisoners for sixty days every time the prisoners arrive at a new facility, *see* Pet. App. 11a-12a, its decision cannot be upheld.[2]

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[2] The application of the most exacting scrutiny to state-imposed racial segregation is also consistent with this nation's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination which provides, "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." International Convention on the Elimination of All Forms of Racial Discrimination, *adopted and opened for signature by the United Nations General Assembly* Dec. 21, 1965, art. 3, 660 U.N.T.S. 195, U.N. Doc. A/6014. The United States ratified the Convention in 1994. *See Grutter*, 539 U.S. at 344 (Ginsburg, J., concurring).

II. Strict scrutiny of racial classifications is essential to public perceptions of fairness in the criminal justice system

"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . . ." *Adarand*, 515 U.S. at 237. And despite this Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (internal quotations omitted), there is no area of our national life in which the perception of continuing racial discrimination is more widespread.

For example, in a 1997 Gallup poll, 72% of black respondents stated a belief that blacks are treated more harshly than whites in the criminal justice system; only 22% of black respondents believed that blacks and whites are treated "about the same." A Gallup Poll Social Audit, *Black/White Relations in the United States 1997: Topline and Trends* 27 (1997) (Item 24). Even among white respondents, nearly half (44%) believed that blacks are treated more harshly. *Id.* In the same poll, 60% of black respondents believed that blacks are treated less fairly than whites in dealings with the police. *Id.* at 25 (Item 22(f)). Indeed, the perception that race matters in the criminal justice system is all but universal. *See Georgia v. McCollum*, 505 U.S. 42, 61 n.1 (1992) (Thomas, J., concurring in the judgment) (noting that the phrase "all white jury" had appeared over 200 times in the preceding five years in the New York Times, Chicago Tribune, and Los Angeles Times).

The effects of a widespread loss of confidence in the racial fairness of the criminal justice system are obvious, concrete and substantial. "[L]awyers and judges increasingly perceive that some African-American jurors vote to acquit

black defendants for racial reasons, a decision sometimes expressed as the juror's desire not to send yet another black man to jail." Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 679 (1995) (footnotes omitted). Indeed, the article's author – a former federal prosecutor – ultimately concludes that "it is the moral responsibility of black jurors to emancipate some guilty black outlaws." *Id.*

Unfortunately, there is ample raw material for a perception that the criminal justice system is not fair to minorities. Although African-Americans constitute 11.4 % of the American population aged 18 and over,[3] nearly half (46%) of state and federal prisoners are black. Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2000* 3 (rev. 2003). Black and Hispanic prisoners together make up nearly two-thirds (62%) of the federal and state prison population. *Id.* The Bureau of Justice Statistics estimates that on December 31, 2002, 10.4% of *all* black males aged 25 to 29 were in prison. Bureau of Justice Statistics, *Prisoners in 2002* 9 (rev. 2003).

This overrepresentation results in part from the fact that minorities receive longer sentences than whites. An American Bar Association report concluded that "[f]or all types of offenses, minorities generally serve more time until first release than do whites." American Bar Association, *The State of Criminal Justice* 17 (2000). For federal prisoners, the adoption of the federal sentencing guidelines appears to have aggravated the disparity. "Whereas the average imprisonment sentence given to blacks in non-guideline cases disposed in 1986-88 differed from sentences given to whites

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[3] U.S. Census Bureau, *Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for the United States: 2000* (2001), *available at* http://www.census.gov/population/cen2000/phc-t1/tab01.pdf.

by only two to four months . . . , the gap had grown to 18 months in guideline cases in 1989, and to 25 months during the first half of 1990." Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90* 177 (1993). By 1990, black federal defendants were receiving sentences an average of 47% longer than white federal defendants. *Id.* The United States Sentencing Commission has frankly acknowledged "the growing disparity between sentences for Black and White federal defendants." United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 154 (1995), *available at* http://www.ussc.gov/crack/chap5-8.pdf.

Moreover, bail amounts for black defendants have been found to be substantially higher than those for whites, even when other variables are controlled. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 Stan. L. Rev. 987, 991-92 (1994) (after controlling for eleven variables relating to the severity of the alleged offense, bail amounts for black male defendants in New Haven were 35% higher than those set for white males).

It is against this background – substantial overrepresentation of minorities in prison, and a widespread perception that the criminal justice system is racially biased – that an explicit policy of segregating prisoners by race must be viewed.

Half a century ago, this Court recognized that "separate but equal" is an oxymoron; "[s]eparate educational facilities are inherently unequal." *Brown v. Bd. of Educ.*, 347 U.S. at 495. This is in large part because "the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group." *Id.* at 494. The Court recognized the inescapable stigma of racial segregation despite unchallenged findings below "that the Negro and white schools involved have been equalized, or are being

equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors." *Id.* at 492; *see also Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting) ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. . . . The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."), *overruled by Brown v. Bd. of Educ.*, 347 U.S. at 494-95.

This Court has acknowledged that public confidence in the justice system is advanced when citizens are not subject to differential treatment based on their race. *See Batson*, 476 U.S. at 99 ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."). Conversely, there can be no doubt that segregation of prisoners by race, even if all prisoners are provided comparable conditions of confinement, will be widely interpreted as a badge of inferiority stamped upon minority prisoners. It will be seen by many as an explicit acknowledgment of what has long been suspected: that racial minorities are second-class citizens in the criminal justice system.

In light of these considerations, segregation of prisoners by race must be permitted, if at all, only upon a showing that it is the least intrusive means necessary to advance a compelling governmental interest. "'[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate[;] . . . racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Adarand*,

515 U.S. at 236 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533-35, 537 (1980) (Stevens, J., dissenting) (footnotes omitted)).

III. The Court should not apply *Turner* to racial segregation claims

A. The rationale for applying *Turner* does not apply to racial segregation claims

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court reviewed challenges to prison regulations restricting prisoner-to-prisoner correspondence and prisoners' ability to marry. The Court determined that these regulations could be upheld only if they were reasonably related to a legitimate penological interest. *Id.* at 89. The Court identified four factors relevant to the determination of the reasonableness of the regulations at issue: whether there is a "valid, rational connection" between the prison regulation and a legitimate and neutral governmental interest put forth to sustain it; whether there are alternative means of exercising the right that remain open to prisoners; what effect accommodation of the asserted constitutional right will have on guards and other prisoners; and whether ready alternatives are available, so that the challenged policy represents an "exaggerated response." *Id.* at 89-91 (citations and internal quotations omitted).

The Ninth Circuit, in its decision affirming the grant of summary judgment in favor of the prison officials in this case, stated that "the standard of review is paramount" to the result in this case. Pet. App. 11a. It then concluded that the standard of review developed in *Turner* should apply to all claims of racial discrimination in the prison setting. Pet. App. 11a-12a.[4]

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[4] The Ninth Circuit conceded that *Turner* may not apply to Eighth Amendment challenges. Pet. App. 12a n.6.

This conclusion is faulty because, as set forth below, this Court has applied *Turner*'s standards only to a specific subset of constitutional challenges to prison policies and regulations.

Although the Court has not been explicit in describing why it has applied *Turner* to some prisoner claims but not others, a consideration of the Court's decisions suggests the principle at work. In *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court set forth the basic rationale for applying the *Turner* standards to prisoner constitutional rights, namely when the right in question is in intrinsic tension with the necessities of confinement:

> Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. And, as our cases have established, freedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.

539 U.S. at 131 (citations omitted).

Thus, this Court has acknowledged that there is a continuum of constitutional rights, some of which are more compatible with the exigencies of imprisonment than others. In the cases in which the Court has applied the *Turner* standard, the challenged regulation has restricted a prisoner's active exercise of rights; these cases have involved rights to free expression, rights to expressive or intimate associations, rights to refuse medical care, and rights to petition for redress of grievances.[5]

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[5] All of the cases in which the Court has applied *Turner* involve either First Amendment or Due Process interests. In *Turner* itself, the Court considered regulations involving prisoner-to-prisoner correspondence and the right to marry. *Turner*, 482 U.S. at 81. Prisoner correspondence rights are obviously grounded in the First Amendment,

These applications of *Turner* reflect the fact that incarceration necessarily restricts prisoners' ability to exercise free will in myriad dimensions: prisoners lose control over where they will live and with whom; what work they will perform; when they will eat and sleep; and other aspects of their lives that ordinarily are matters of private choice. In all the cases in which this Court has applied *Turner*, the rights at stake were ones that are actively exercised, rather than rights that a person simply enjoys.

In contrast, Eighth Amendment rights are "enjoyed" rather than "exercised;" they are passive rights that serve only as limits on the power of the government:

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see Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989), while the right to marry is based on the Due Process Clause, *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In *Overton v. Bazzetta*, 539 U.S. 126 (2003), as noted *infra* p. 19, the Court applied a *Turner* analysis to a claim that prison regulations limiting visitation infringed on prisoners' associational rights. Associational rights have both First Amendment and Due Process components. *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (citing both Due Process and First Amendment cases in recognizing a right of intimate association).

As noted *infra* note 6, the Due Process interest at stake in *Washington v. Harper*, 494 U.S. 210 (1990), was the right to freedom from bodily restraint. In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court considered a challenge to prisoners' right of access to courts, a right founded on both the First Amendment and the Due Process Clause. *Id.* at 346.

All of the remaining cases have involved only First Amendment claims. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), the Court considered a challenge to a prison policy that barred Muslim prisoners from attending weekly religious services. *Id.* at 345. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court considered a First Amendment challenge to restrictions on prisoners' receipt of publications. *Id.* at 403. In *Shaw v. Murphy*, 532 U.S. 223 (2001), the Court applied a First Amendment analysis to a prisoner's asserted right to provide legal assistance to other prisoners. *Id.* at 231.

> In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter and medical care, and must "take reasonable measures to guarantee the safety of the inmates."

Farmer v. Brennan, 511 U.S. 825, 832 (1994) (citations omitted). Similarly, restrictions on the government's ability to punish arbitrarily, restrictions founded in the Due Process Clause, also act as restraints on governmental power rather than as protections for individual volitional interests. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is the protection of the individual against arbitrary action of government."). These rights are violated regardless of a person's expressed objection to exercise of governmental power. For example, it would not be constitutional for the government to execute someone for the crime of shoplifting, even if that person did not object.

It is difficult to apply the *Turner* standard to passive rights such as the right to be free from cruel and unusual punishment. As noted, one of the four prongs of the *Turner* standard involves consideration of "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Eighth Amendment rights are either recognized or denied; it is as difficult to imagine an alternative way to exercise one's Eighth Amendment rights as it is to imagine how to be a little bit pregnant.

These considerations help to explain why the Court has never applied its four-pronged test to cases in which prisoners have challenged policies that implicate only the

limits of governmental power to punish prisoners. *See Hope v. Pelzer*, 536 U.S. 730 (2002) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a challenge to a prison regulation that allowed disciplining a prisoner by shackling him to a rail); *Sandin v. Conner*, 515 U.S. 472 (1995) (analyzing under the Due Process Clause, without reference to *Turner* standards, a challenge to a prison disciplinary hearing); *Farmer v. Brennan*, 511 U.S. 825 (1994) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner claim that authorities failed to provide necessary safety); *Helling v. McKinney*, 509 U.S. 25 (1993) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to exposure to second-hand smoke); *Hudson v. McMillian*, 503 U.S. 1 (1992) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to use of force); *Wilson v. Seiter*, 501 U.S. 294 (1991) (analyzing under the Eighth Amendment, without reference to *Turner* standards, a prisoner challenge to a variety of conditions of confinement).

It is true that the distinction between rights that one "exercises" and rights that one "enjoys" blurs on the margins, but the Court has resolved this blurriness by looking at the way the prisoner frames the issue. Thus in *Overton v. Bazzetta*, 539 U.S. 126 (2003), the Court analyzed a regulation allowing a potentially permanent ban on prisoner visitation under the Eighth Amendment without reference to *Turner* standards. At the same time, the Court separately applied a *Turner* analysis to the claim that this regulation, as well as other regulations limiting prisoners' visits with family members and friends, infringed on the prisoners' associational rights. *Overton*, 539 U.S. at 130-36.

Similarly, in *Washington v. Harper*, 494 U.S. 210 (1990), cited by the court below as the rationale for applying *Turner* analysis to all prisoner regulations, *see* Pet. App. 12a, the prisoner framed his claim as a right to refuse psychotropic

medications, which is an aspect of freedom from bodily restraint protected by the Due Process Clause,[6] and the Court applied *Turner* standards in determining the result. *Id.* at 223-26. By contrast, although the prisoner's claim regarding a prison policy of handcuffing prisoners to a rail in *Hope v. Pelzer* could have been characterized as an issue of freedom from bodily restraint, the prisoner invoked the Eighth Amendment, and the Court did not apply *Turner*. *Hope*, 536 U.S. at 733.

While the line between rights one "exercises" and rights one "enjoys" may not always be clear, the right not to be subjected to governmental classifications on the basis of race is unambiguously a right that is "enjoyed," like the right not to be subjected to arbitrary or cruel and unusual punishment. Moreover, freedom from segregation on the basis of race is not in tension with the necessities of confinement, and is completely "compatible with incarceration," *Overton*, 539 U.S. at 131; racial segregation is not necessary to any penological purpose. Further, as is the case with Eighth Amendment claims, it is difficult to conceptualize how the entire *Turner* standard can be applied in a meaningful way to racial segregation claims. A prisoner subjected to racial segregation, for as long as that segregation lasts, is entirely deprived of the right not to be classified by race at the hands of the government. Like prisoners who are currently being subjected to cruel and unusual punishment, prisoners segregated by race are not provided with an

[6] *Washington v. Harper* cites *Youngberg v. Romeo*, 457 U.S. 307 (1982), for the proposition that avoiding the administration of psychotropic medication implicates a constitutional right. *Harper*, 494 U.S. at 221-22. At the point cited, *Youngberg* characterizes the constitutional claim as "a right to freedom from bodily restraint." 457 U.S. at 316.

alternative means of exercising their rights by the prospect that the infringement will end at some future point.[7]

Indeed, a clear marker that the Fourteenth Amendment's Equal Protection clause operates as a restriction on the powers of the government is that the constitutionality of racial segregation by governmental command does not depend on the agreement or disagreement of those affected by the governmental action. *Brown v. Bd. of Educ.*, 349 U.S. at 300 ("But it should go without saying that the vitality of these constitutional principles [regarding elimination of racial segregation in schools] cannot be allowed to yield simply because of disagreement with them."). The rationale for the *Turner* standard, developed in a context in which the limitations on constitutional rights are necessitated by imprisonment, does not justify its application to Equal Protection challenges to racial segregation.

B. The *Turner* standard would give too little weight to the interest in eliminating racial discrimination

In *Lee v. Washington*, 390 U.S. 333 (1968), this Court issued a *per curiam* affirmance of a three-judge court order declaring unconstitutional Alabama statutes requiring racial segregation in prisons and jails. Indeed, the Court characterized the argument that such statutes were constitutional as "without merit." *Id.* As a result of *Lee*, prisons and jails across the country were desegregated.

Notably, the rationales of California prison administrators for imposing racial segregation in classification cannot be distinguished from those of the prison

[7] *Cf. Blevins v. Brew*, 593 F. Supp. 245, 247 (W.D. Wis. 1984) (awarding damages to a prisoner subjected to racial segregation in housing during his initial classification, even though the prisoner was allowed to participate in daily program activities with other prisoners on a non-racial basis when he was out of his cell).

administrators a generation ago who claimed that ending enforced racial segregation in prisons and jails would lead to violence. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 190-91 (5th Cir. 1994) (prison officials testified that racial segregation in two-man cells at the Louisiana State Penitentiary at Angola was "motivated by security concerns and the past incidents of violence between black and white prisoners;" prison guards were unable to monitor visually the two-man cells at all hours of the night; prisoners in Angola are "the worst of the worst;" two instances occurred in which black and white prisoners housed together became violent; racial supremacy groups existed within the prison ranks; and interracial conflicts may have triggered more generalized racial violence); *United States v. Wyandotte County, Kan.*, 480 F.2d 969, 971 (10th Cir. 1973) (*per curiam*) (jail administration attempted to justify policy of assigning prisoners to the "tanks" on the basis of race because those placed in tanks were "hardened criminals" with a propensity for violence); *Blevins v. Brew*, 593 F. Supp. 245, 246-49 (W.D. Wis. 1984) (incoming prisoners at FCI-Oxford were segregated by race when double-celled; ordinarily staff did not have an opportunity to review the central files of incoming prisoners before they arrived, or to interview them before their first housing assignment; on the day following admission, prisoners could request adjustment of their housing assignment, and the prison did not consider race in making such adjustments; prison official testified that he was aware of growing prominence within prisons of groups advocating racial hatred, and that he believed that he would be subjecting prisoners to a substantial risk of injury if he placed two prisoners of different races in the same cell); *McClelland v. Sigler*, 327 F. Supp. 829, 830 (D. Neb. 1971), *aff'd*, 456 F.2d 1266 (8th Cir. 1972) (white prisoners were housed in West Cell Hall if they objected to living with black prisoners; East Cell Hall housed prisoners of all races; prison warden testified that putting blacks in the West Cell Hall would cause "uncontrollable trouble" between the races, that following sexual assault by black prisoner on white prisoner there was

a sit-down strike in the mess hall, that a small percentage of black prisoners has a tendency to prey on young, weak white men, and that racial tension resulting in an assault on a guard had been the subject of legislative hearings); *cf. Rentfrow v. Carter*, 296 F. Supp. 301, 302-03 (N.D. Ga. 1968) (ten prisoners at the Georgia State Prison, five white and five black, asked court to stop racial desegregation of penal institutions ordered by federal court on the ground that violence would result from order and that prisoners from both races would violently resist racial desegregation; the prisoners alleged that "frequent and violent killings" occurred in the prisons and that there was an "acute shortage of custodial officers").

If, in the cases discussed above, the courts had allowed prison officials' mere assertions of potential racial violence permanently to defeat Equal Protection claims, it is highly likely that a large segment of the nation's prisons would not have been desegregated, and our prisons and jails would have become the one set of public institutions in the country in which racial segregation retained official sanction. It is even likely that many prisons and jails would remain racially segregated to this day, a living fossil of the racial caste system that disgraced our country.

Applying the *Turner* standard to claims of racial segregation would make it too easy to conceal racial animus under the cloak of deference to correctional officials.[8] If the Court were to apply a *Turner* standard to claims of racial segregation, courts would be forced to apply the same deferential standard to claims of outright racial discrimination. Indeed, as recently as 2002, California's prison system subjected "Southern Hispanics" to a lockdown

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[8] Not even Congress is entitled to deference when courts review race-based policies. *See, e.g., Adarand*, 515 U.S. at 235 (overruling *Fullilove v. Klutznick*, 448 U.S. 448 (1980) to the extent that it required anything less than strict scrutiny for federal racial classifications).

lasting over a year solely on the basis of their perceived ethnic identification. Pet. App. 16a n.9. Assigning prisoners to the severely restricted conditions of "lockdown" confinement for over a year solely on the basis of ethnicity or race should not carry a presumption of constitutionality, as application of the *Turner* standard would require.[9] This standard would make rank discrimination too easy to defend.[10]

C. The *Turner* standard is too blunt a tool for application to racial segregation claims

The court below reasoned that, under *Turner*, it did "not have to agree that the policy actually advances the [California Department of Corrections'] legitimate interest but only 'whether the defendants might reasonably have thought that the policy would advance its interests.'" Pet. App. 22a. Given the substantial public interest in avoiding racial segregation, the *Turner* standard fails to allow the careful balancing of countervailing public interests that should inform judicial review of racial classifications.

In particular, the *Turner* standard allows courts to ignore substantial evidence that policies of racial discrimination actually promote violence. *See, e.g.*, Chad Trulson, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prison*, 37 Law & Soc'y Rev.

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[9] *See, e.g., Overton*, 539 U.S. at 132.

[10] The dissent from the denial of rehearing *en banc* provides a hypothetical policy that would be protected from serious scrutiny under the standard followed in the court below: prison officials could decide that prisoners could be barred from visitation with spouses and children if they appeared to be of a different race, on the ground that such visits would lead to unrest in the racially charged atmosphere of a prison. "The prisoner would have to prove that there would *not* be a riot . . . . It is certainly 'plausible' that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could potentially lead to conflict." Pet. App. 43a-44a (citation omitted).

743, 774 (2002) (a study of ten years of data from the Texas Department of Criminal Justice in the aftermath of desegregation of double cells indicates that, over the long term, the rate of violence between prisoners segregated by race in double cells surpassed the rate among those racially integrated).

The Ninth Circuit, in approving the California prison system's policy of deliberate racial segregation, relied on testimony of an Associate Warden that, if race were not considered in making initial housing assignments, "she is certain that there would be racially based conflict in the cells and in the yard." Pet. App. 4a. In fact, the prison officials' own evidence supports the hypothesis that violence results from the prevalence of gangs rather than from racial tensions. The court of appeals described seven specific incidents, all of which involved gang-related violence. In one of these incidents, the gang-affiliated white prisoners attacked white prisoners not affiliated with gangs. Pet. App. 16a-17a n.9. While gang membership may be a good surrogate for ethnic identification, the more important questions are whether ethnic identification is similarly a good surrogate for gang membership, or for a proclivity for interracial violence. The court below, however, does not address these issues. Moreover, the seven incidents cited by the court below involve a total of perhaps 700 prisoners. Given that the population of the California prison system exceeds 164,000, this record is lacking a critical link between the global policy of racial segregation and the asserted justification.

Aside from the serious question of the extent to which the evidence cited by the court of appeals demonstrates a pervasive level of racial tension in the California prison system, the evidence cited also raises the question of whether segregation by race or ethnicity even curbs racial violence. Segregation of incoming prisoners sends a powerful signal that prisoners of other races are so dangerous that safety lies in sticking with one's "own kind." As a result, segregation of

new prisoners by race during the initial classification process facilitates the recruitment of new gang members. Moreover, the poor fit between racial identification and membership in a particular gang is underlined by the notorious rivalry between the Crips and the Bloods, two African-American gangs. *See, e.g.*, Alan Elsner, *Gates of Injustice: The Crisis in America's Prisons* 39 (2004) (noting that Crips and Bloods members in prison "continue to wage endless war" against each other).[11] Putting a Crip and a Blood together in a cell is at least as dangerous as putting members of two different ethnic groups in the same cell. Accordingly, segregating new prisoners by race is both extraordinarily overinclusive and underinclusive as a technique to prevent prison violence.

Given the strong public interest in avoiding official racial segregation, evidence that such segregation is unnecessary and even harmful is critically important. Because application of the *Turner* standard would cause courts to discount such evidence, the Court should reject *Turner*'s application here.

D. The *Turner* standard is unnecessary to protect the interest in maintaining prison safety and security

In *Lee v. Washington*, this Court noted that it read the order from the lower court as making "allowance for the necessities of prison security and discipline." 390 U.S. at 333-

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[11] Gangs of one ethnic group will fight with gangs whose membership has the same ethnic profile while allying with gangs of different ethnic backgrounds. "The Aryan Brotherhood has a working relationship with the Mexican Mafia and the Dirty White Boys, an Anglo offshoot of the Texas Syndicate. It also uses Nazi Low Riders, a mixed White-Hispanic gang to do some of its dirty work. The Black Guerrilla Family has an active working relationship with La Nuestra Familia but wages war against the Aryan Brotherhood and the Mexican Mafia." Elsner, *supra*, at 41-42. Thus, noting that a prisoner has a given ethnic identity does not necessarily identify from whom that prisoner is at risk.

34. In a concurring opinion, Justice Black stated that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails," while carefully noting that this qualification did not dilute the prohibition against racial discrimination. *Id.* at 334 (Black, J., concurring).

In the district court decision in *Lee* itself, the three-judge court had noted that "the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human beings." *Washington v. Lee*, 263 F. Supp. at 332 (internal citation omitted). The result of that consideration was not, however, to allow the constitutional principle to be compromised, but rather to design an order giving the responsible officials a reasonable period of time to plan a phased-in desegregation plan. *Id.*

In cases subsequent to *Lee*, when there has been real evidence that the goal of elimination of racial segregation was in significant tension with the maintenance of security and control, the federal courts have required that the responsible officials take the necessary steps to assure both reasonable safety and fidelity to constitutional principles. Thus, in *Mickens v. Winston*, 462 F. Supp. 910 (E.D. Va. 1978), jail officials claimed that their policy of using portions of the facility to house black detainees, while other sections held detainees of all races, was necessary to maintain racial balance in integrated housing units. The jail's housing units included large dormitory-style units, in addition to tiers of individual cells, and only one guard was on duty per shift. *Id.* at 911-12. Although the court noted that, under those circumstances, jail officials faced a "difficult, if not impossible, task of affording appropriate supervision," *id.* at 912, the court concluded that the solution lay in proper supervision of all the prisoners;

providing enough personnel to protect the physical security of all prisoners would also allow racial integration. *Id.* at 913.

Similarly, in *White v. Morris*, 832 F. Supp. 1129 (S.D. Ohio 1993), racial tensions were one significant factor in producing a riot at the Southern Ohio Correctional Facility that resulted in ten deaths. Moreover, prisoner security records had been destroyed in the riot. As a result, following the riot, officials began assigning prisoners to cells on the basis of race. The officials also requested modification of a consent decree requiring that cell assignments be made without regard to race. Under these particularized circumstances, the court appropriately granted a temporary modification of the consent decree to allow the implementation of a plan that would allow the prison to return to full integration while still providing reasonable safety:

> Without records necessary to accurately classify prisoners' security status, in the midst of an investigation into the riot by law enforcement agencies, and in the face of high post-riot racial tensions, we conclude that forcing the Defendants to comply with the terms of the Consent Decree could lead to a renewed state of emergency.
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> . . . .
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> . . . Thus, the Defendants must be first given a reasonable time to reconstruct the records which were destroyed during the riot. Without the crucial information lost in those records, attempting integration could be dangerous to both staff and prisoners, and thus, random celling cannot proceed according to the consent decree.
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> . . . .
>
> . . . Evidence developed at the hearing established that a great percentage of the inmates at SOCF are from urban areas, and a majority of whom are African-American. Conversely, ninety per cent of the staff at SOCF is white, from rural areas, with little or no experience in relating to minorities from urban environments.
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> . . . .
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> . . . With a time table and clearly defined goals [for a return to completely integrated housing assignments over a defined period of time], along with the sensitivity training for the staff mandated by the Court, we find the modification satisfactory, as well as unavoidable.

Id. at 1133-34. Significantly, however, the modification approved by the court envisioned a return to non-racial operation. While particularized circumstances may require a temporary suspension of full racial integration, California's policy is unconstitutional because it contemplates permanent racial segregation within the system. Every temporary suspension of the prohibition against racial segregation should envision an end date.

Nothing in *Lee v. Washington* requires a court to ignore security concerns. Indeed, as a result of *Lee*, the nation's jails and prisons were successfully integrated. There is no need for the federal courts to apply a *Turner* standard to have the tools they need to assure that legitimate security needs are recognized.

CONCLUSION

The decision of the court below to apply the *Turner* standard rather than "strict scrutiny" was outcome-determinative, as the court below acknowledged. Under an appropriate application of the "strict scrutiny" standard, California has failed to justify its policy, which it has followed for twenty-five years, of segregating incoming prisoners by

race during the classification process. For the above reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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